

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LISA TINAJERO

Claimant

VS.

CHAUCER ESTATES LLC.

Respondent

AND

PENNSYLVANIA MANF. ASSOCIATION

Insurance Carrier

Docket No. **1,050,010**

ORDER

Claimant requests review of the October 25, 2010 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

It was undisputed that claimant suffered a compensable injury while working for respondent. The disputed issue at preliminary hearing was the amount of claimant's average gross weekly wage and calculation of the amount of temporary partial disability compensation.

The Administrative Law Judge (ALJ) determined claimant's average gross weekly wage to be \$368.76 and then ordered respondent to pay temporary partial disability compensation based upon the difference between that pre-injury wage and the amount claimant actually earned after the injury.

Claimant requests review and argues the ALJ erred in the calculation of claimant's average gross weekly wage.

Respondent argues the Board does not have jurisdiction to review the issue raised by claimant on an appeal from a preliminary hearing. In the alternative, respondent further argues the ALJ's Order should be affirmed.

The issue for the Board's review in this appeal is:

Does the Board have jurisdiction over the issue of whether the ALJ erred in calculating the claimant's average gross weekly wage? If so, what is claimant's average gross weekly wage?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.¹ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues which are: (1) whether the worker sustained an accidental injury; (2) whether the injury arose out of and in the course of employment; (3) whether the worker provided timely notice and timely written claim; and, (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.²

The issues of whether a worker satisfies the definition of being temporarily disabled and average weekly wage are not jurisdictional issues listed in K.S.A. 44-534a(a)(2). Additionally, these issues of whether a worker meets the definition of being temporarily partially disabled and what is the appropriate compensation rate for payment of temporary partial disability benefits are questions of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.³

As the ALJ had the jurisdiction and authority to determine the average weekly wage and grant temporary partial disability benefits at the preliminary hearing, the Board does not have jurisdiction to address these issues at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁴ Accordingly, claimant's appeal is dismissed.

¹ K.S.A. 2009 Supp. 44-551.

² *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 674, 994 P.2d 641 (1999).

³ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁴ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

The claimant may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In summary, K.S.A. 44-534a specifically grants an ALJ the authority to decide at a preliminary hearing issues concerning the payment of temporary disability compensation. Determination of claimant's average weekly wage is required to compute temporary disability compensation. Therefore, the ALJ did not exceed his jurisdiction in determining an average weekly wage and awarding temporary partial disability benefits. As stated above, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, it is the finding, decision and order of this Board Member that the appeal from the Order of Administrative Law Judge Thomas Klein dated October 25, 2010, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of January 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2009 Supp. 44-555c(k).